

Art Law Gallery

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[Some Artists Paint Buildings](#)

Like it or not, "street art" is becoming a mainstream phenomenon in America. Due in part to the high profile of artists like Shepard Fairey and Banksy, and the pioneering philosophy of museum directors like MoCA's Jeffrey Deitch—who has planned a large-scale street art show for 2011—what was once considered urban blight is now being recognized as a legitimate artistic medium.

While the basic legal issues facing street artists are relatively straightforward—painting a building/sign you don't own can lead to civil and criminal liability—the more nuanced legal issues concern copyright and ownership. If Banksy does [this](#) to my warehouse, can I sell my wall to a museum? Can I make T-shirts or take photos? Can I paint over it? While these types of questions are probably anathema to most street artists, they are great food-for-thought for those on art's "business side" and, most of all, us lawyers.

Copyright Basics:

Copyright protects "original works of authorship fixed in any tangible medium of expression." This means that, while ideas are not protectable, their physical manifestation probably is. Thus, the *idea* of painting a [Cro-Magnon man with a tray of fast food](#) cannot be protected by copyright (although it is quite clever). Any other artist could take the same underlying idea and turn it into a unique and copyrightable expression of his own. Indeed under copyright law, only the image itself is protectable—the physical manifestation of the idea. Through stencils, sketches, and the final "graffiti" image, the street artist fixes his creative expression "in a tangible medium;" thus, earning the artist the protections afforded by copyright law.

Rights of Copyright Holders:

Once an image is "fixed in a tangible medium of expression," the creator of the work enjoys the exclusive right to make and distribute copies, to display the work publicly, and to make derivative works (subsequent copyrightable creations based on the original work). Thus, Banksy is the only one who can make and distribute copies of his Cro-Magnon design, utilize the design on t-shirts or other goods, or choose to display a painting of that design in a museum. However, this bundle of exclusive rights is limited by the "First-Sale Doctrine," wherein one who is the rightful holder of a lawful copy of the copyrighted work has the right to lawfully sell, lend, trade, or give away his or her copy (with some limitations).

At a basic level, the street artist is the sole holder of the copyright to his creations; however, if a piece is painted onto a building owned by another, the building owner is the rightful holder of that particular "copy" of the work. Therefore, the building owner could, hypothetically, cut out the wall on which the art was placed and sell or lend it. Recently, executives from Amazon were reported to have done exactly this—removing graffiti paintings from the side of their Seattle offices before it was torn down and then reinstalling them in their new corporate headquarters, which was built on the same site.

A building owner cannot, however, begin making t-shirts and mugs with the Cro-Magnon design because doing

so would constitute the creation of unlawful derivative works or copies—the building owner is no longer using the wall but, instead, is using the art itself. Similarly, a photographer could not legally photograph the Cro-Magnon man with a tray and then proceed to sell them for pecuniary gain. Capturing the painting in photographs is also a copy or derivative—even if the photographer uses substantial creativity in framing and lighting the piece. In the past few years, there have been numerous instances in which photographic compilations of murals and graffiti art have led to graffiti artists seeking a [share of profits](#). CanTwo, a prominent German graffiti artist, even found one of his cartoon-style characters used without permission on the Spanish synchronized swim [team's bathing suits](#). In fact, the building owner might also be prevented from webstreaming or capturing the art on videotape—perhaps nobody knows this better than the production attorneys for shows like "Law & Order," who frequently work with New York City's street art community to obtain clearances for murals appearing in background shots.

On the other hand, the street artist may not want to demand credit for his work nor trouble himself with copyright and compensation. As Banksy himself once dismissively stated: "copyright is for losers." In fact, making such a demand could expose the artist to civil and criminal liability for vandalism, trespassing, and a host of other potential violations. If artists never takes credit for their work, however, they may miss out on some copyright protections and may inadvertently decrease the duration of their copyrights.

Copyright Duration:

For works created on or after January 1, 1978, if an artist creates a work under a pseudonym (for example, calling oneself "[Futura](#)" instead of signing your work with your actual name) or creates a work anonymously, the copyrights in that work only lasts for the lesser of 95 years from first publication or 120 years from the year of its creation. However, if an artist's identity is revealed in the registration records of the Copyright Office (including in any other registrations made prior to the expiration of the copyright term), then the term will last for either (a) the life of the author plus 70 years; or (b) in the case of a work made by more than one person, for the life of the last surviving author plus 70 years. Thus, an unattributed work will usually lapse into the public domain much sooner than an attributed work.

Visual Artist's Right of Attribution and Integrity:

Thus far, we have established that a building owner can sell his or her wall to a museum but cannot make t-shirts or sell photos of the art. Still remaining is the question of whether a building owner may paint over a given work of street art. The standard provisions of copyright law only prevent people from violating the copyright holder's exclusive rights—distribution, copying, and derivatives. Thus, the copyright holder would typically be powerless to stop the destruction of his or her work; however, if the work is of "recognized stature," the artist may be able to prevent its destruction by exercising his moral rights under the Visual Artist's Right of Attribution and Integrity ("VARA").

VARA grants the author of a "work of visual art" the right to prevent the destruction of a work of "recognized stature." Upon passing VARA in 1990, Congress instructed courts to use common sense and generally accepted standards of the artistic community in determining whether a particular work falls within the scope of the definition [of a 'work of visual art'], and explicitly stated that "whether a particular work falls within the definition should not depend on the medium or materials used." Thus, a work of art painted or sprayed onto a wall should still fall within this definition.

To determine whether a work is of "recognized stature," courts typically apply a two-part test: (1) the work is viewed as meritorious and (2) this stature is recognized by art experts, other members of the artistic community, or some other cross-section of society. To satisfy this test, the artist will probably have to rely on expert witnesses; however, a long-existing work with some importance to the community should be sufficient.

Assuming that a mural or piece of street art is shown to be of "recognized stature," destruction thereof can lead

to substantial liability. In 2008, Kent Twitchell (an American muralist) settled a case under VARA and California's Art Preservation Act (CAPA), in which he was awarded approximately \$1,100,000 for the destruction of his [70-foot-tall landmark mural](#) of the iconic L.A. artist Ed Ruscha.

However, even if all the VARA elements are met, courts may still deny relief to artists who have illegally placed their works on property. While this proposition has seldom been addressed, the 1997 ruling in English v. BFC&R East 11th St., LLC, 1997 WL 746444 [S.D.N.Y. 1997]) set a difficult precedent for illegal street artists. In the case, a group of sculptors had illegally placed various works of art within a community garden (a city-owned lot). Upon hearing that the lot had been sold for development, the artists attempted to use VARA to stop the sale and subsequent destruction of the garden. In denying the VARA motion, a New York court found that VARA did not apply to art that has been illegally placed on the property of another without the owner's consent when that artwork cannot be removed from the site in question. While subsequent cases in New York seem to have moved away from this precedent, it seems likely that future street artists would have difficulty utilizing VARA to prevent the destruction of illegally placed artwork.

Conclusion:

Ultimately, while copyright grants street artists the ability to control the copying and distribution of some of their work, artists who illegally paint the property of another are probably without a means of stopping the destruction, removal, or transfer of that particular manifestation. As a result, public pressure rather than copyright law is probably the best means of protecting such work—if the work is truly special, of recognized stature, or widely appreciated by members of the community, then coordinated action from local citizens may be the only way to save it.

Even with the growing recognition of street art, illegally placed artwork is subject to the wishes of the landowner. While this legal reality makes sense from a policy perspective (we probably shouldn't allow great artists to go around hijacking privately-owned buildings), it has also led to the destruction of many important works of art.

On the other hand, the constant painting-over, hacking or alteration by other graffiti artists, and the ever-changing urban landscape of cities like Los Angeles and New York helps to drive street art forward. While such art can legally be commoditized, it is inherently impermanent. Perhaps today's street artists owe thanks—the laws that constrain the medium also force it to adapt and evolve. Besides, copyright is for losers.